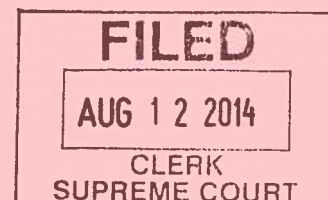


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
No. 2013-SC-000425-D



TAMMY DILLARD

APPELLANT

On Review from the Court of Appeals
No. 2011-CA-001917-DG
Jefferson Circuit Court
v. No. 11-XX-00017
Hon. Frederic Cowan, Judge

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT, TAMMY DILLARD

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Certificate of Service

This is to certify that a copy of the foregoing was mailed, first class postage prepaid, to Hon. Frederic Cowan, Judge, Jefferson Circuit Court, Division 13, Jefferson County Judicial Center, Louisville, KY 40202, to Hon. Jennifer B. Wilcox, Judge, Jefferson District Court, Division 101, Jefferson County Judicial Center, Louisville, KY 40202, and to Hon. David A. Sexton, Special Assistant Attorney General, Assistant County Attorney, Fiscal Court Building, 531 Court Place, Suite 1001, Louisville KY 40202, and served electronically, by agreement, on Hon. Dorislee Gilbert, Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202, at dgilbert@louisvilleprosecutor.com, on August 11, 2014. I further certify that the record on appeal was not removed from the office of the Clerk of this Court.


BRUCE P. HACKETT

INTRODUCTION

This appeal originated in Jefferson District Court from a conditional plea of guilty that reserved for appellate review a restitution issue. The Jefferson Circuit Court dismissed the appeal to that court, finding that the Jefferson District Court had not entered a final judgment. After granting discretionary review, the Court of Appeals affirmed the circuit court, finding that no final order of restitution had been entered.

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument may be helpful to this Court because the issue reserved by the appellant's conditional plea of guilty and presented in this appeal is an issue of first impression in the Commonwealth. The appellant believes that oral argument will assist the Court in the consideration and resolution of the issue. Therefore, the appellant requests that this Court schedule the case for argument.

NOTE CONCERNING CITATIONS

The district court audiotape record will be designated as: (AR, month/day/year, minute:second) in this brief. The circuit court video record will be designated as: (VR, month/day/year, hour:minute:second). References to the circuit court clerk's record will be: (TR, page). References to the Appendix to this brief will be: (App., page).

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STATEMENT OF THE CASE

Tammy Dillard was involved in an auto accident on February 12, 2010. The Commonwealth's theory was that Ms. Dillard's vehicle struck the vehicle in front of her, in turn, forcing that vehicle to strike another car. The owner of one of the damaged vehicles had full coverage insurance and was not seeking restitution but the other owner (Ms. Halk) was seeking reimbursement for \$3600.00 in damages. (AR, 1/7/11, 01:00). The Commonwealth maintained that Ms. Dillard was at fault for the accident. Ms. Dillard maintained that there was another vehicle involved in the accident, which left the scene, and that vehicle was the cause of the accident. (AR, 1/7/11, 01:04, 03:00). According to defense counsel, Ms. Dillard thought she had insurance through Safe Auto, but her policy was not in force. Ms. Dillard was charged with one count of Failure of Owner to Maintain Required Insurance/Security, first Offense (KRS 304.39-080). (AR, 1/7/11, 03:04, 27:50).

In May 2010, during discussions with the prosecutor, defense counsel raised the issue of restitution, which ultimately became the subject of the conditional plea and appeal to circuit court. The parties thought that another district court case with the same restitution issues would resolve the matter, but that case was decided without the court reaching the merits of the issue. On January 7, 2011, the district court heard oral arguments on the restitution issue in Ms. Dillard's case. The Court found that Ms. Dillard could be held liable for restitution based on the offense of Failure of Owner to Maintain Required Insurance/Security. (AR, 1/7/11, 30:41).

On February 28, 2011, Ms. Dillard entered a conditional plea of guilty, reserving the right to appeal the court's ruling on the issue of restitution. Ms. Dillard was

sentenced to 90 days to serve and a \$1000 fine, both conditionally discharged for two years. The court ordered Ms. Dillard to pay restitution to the prosecuting witness, Ms. Halk. The restitution hearing, to determine the specific amount of restitution owed, was stayed, pending appeal.

The issue reserved for appellate review was whether the district court had the jurisdiction and authority to order restitution for damages sustained from a traffic accident when the defendant committed only the crime of failing to maintain insurance. As the prosecutor stated at the January 7, 2011, hearing, “I believe we are here today to determine if the court has jurisdiction or the authority to order restitution in a ‘no insurance’ accident case.” (AR, 1/7/11, 02:00).

After entering her plea of guilty, Ms. Dillard filed a timely notice of appeal in district court. (TR 1). On appeal, after hearing oral arguments on the merits of the reserved issue, the circuit court issued an “Opinion and Order Dismissing Appeal and Remanding to District Court,” finding that the appeal had been taken from an order that was not final. (VR, 7/21/11, 01:36:30-02:05:15; TR 57-59; App. C1-3). Ms. Dillard filed a timely motion for reconsideration. The Commonwealth responded by agreeing that the case was properly appealable pursuant to RCr 8.09. (TR 60, 68). The circuit court denied the motion for reconsideration, again finding that the appeal was not from a final order or judgment. (TR 70-72; App. B1-3).

The Court of Appeals granted Ms. Dillard’s motion for discretionary review of the circuit court decision. The Court of Appeals agreed with the circuit court that the appeal was from a judgment that was not final. “Because no final order of restitution was entered, we affirm the circuit court’s dismissal of the appeal.” (App. A1).

In Argument I, Ms. Dillard will demonstrate that the circuit court had jurisdiction to hear the merits of Ms. Dillard's appeal. In Argument II, she will address the merits of the issue reserved for appeal by Ms. Dillard's conditional plea of guilty. Additional facts relevant to the legal issues will be cited in the arguments that follow.

ARGUMENT

I. The Jefferson Circuit Court had jurisdiction to hear the merits of Ms. Dillard's appeal from her conditional plea of guilty taken pursuant to RCr 8.09 from a judgment imposing a conditionally discharged sentence.

This issue was preserved in the circuit court by the appellant's motion for reconsideration of the court's Opinion and Order entered on August 3, 2011. (TR 60-64). The circuit court had ruled that it had no jurisdiction to address the merits of the appeal because no final order had been entered in district court. (TR 57-59; App. C1-3). The Commonwealth had not argued lack of jurisdiction. In fact, the Commonwealth agreed with Ms. Dillard that the restitution issue had been properly preserved and that the circuit court had jurisdiction. (TR 68). Ms. Dillard's motion for reconsideration in circuit court was the first opportunity for her to address the jurisdiction issue. The circuit court denied the motion for reconsideration, again finding that the appeal was not from a final order or judgment. (TR 70-72; App. B1-3).

After accepting discretionary review, the Court of Appeals then affirmed the circuit court determination that the appeal was from an interlocutory order and had to be dismissed. "Because no final order of restitution was entered, we affirm the circuit court's dismissal of the appeal." (App. A1). Both the circuit court and the Court of Appeals overlooked the course of the proceedings in district court and failed to take into account that KRS 533.020 and RCr 8.09 made the imposition of the conditionally

discharged sentence a final judgment for appeal purposes and conferred appellate jurisdiction allowing the circuit court to address the merits of the reserved issue of law. Even if the judgment was not final, the plain language of RCr 8.09, authorizing a “conditional” plea of guilty, signifies that the plea and the judgment rendered thereon is conditional rather than final, but an appeal may nonetheless be taken.

On February 8, 2011, Ms. Dillard pleaded guilty in district court. The judge conducted a *Boykin*¹ hearing, noting that the plea was a conditional plea, reserving for appellate review the issue of restitution. During the colloquy, the judge advised Ms. Dillard that she was giving up her right to appeal, except for the restitution issue. (AR, 2/8/11, 01:45). RCr 8.09 provides a vehicle by which, “[w]ith the approval of the court, a defendant may enter a conditional plea of guilty, reserving in writing, the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion.” After the district court’s ruling on the restitution issue, Ms. Dillard filed a written “Motion to Enter Conditional Plea of Guilty.” The court granted that motion, entering the following order:

IT IS HEREBY ORDERED that the defendant’s motion to enter a Conditional Plea of Guilty is granted, the Court’s ruling regarding the issue of restitution is reserved, and the timely filing of notice of appeal shall stay the proceedings on the judgment.

(TR 67). The district court approved the right to appeal, the legal issue was reserved in writing and the appeal was proper. Under *Dickerson v. Commonwealth*, 278 S.W.3d. 145, 149 (Ky. 2009), there was no impediment to the circuit court reaching the merits of the reserved issue.

¹ *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The circuit court finding that the appeal was from a non-final judgment was based upon the fact that the district court had not actually imposed an amount of restitution. (TR 57-59; App. C1-3). But the circuit court ruling was a misunderstanding about the issue that was reserved for review and a misapplication of KRS 533.020 and RCr 8.09. The sentence in Ms. Dillard's case was conditionally discharged. According to KRS 533.020, the district court judgment is a final judgment: "Notwithstanding the fact that a sentence to probation, probation with an alternative sentence, or conditional discharge can subsequently be modified or revoked, a judgment which includes such a sentence shall constitute a final judgment for purposes of appeal."

A criminal defendant does not generally have the right to take an interlocutory appeal under KRS 22A.020. *Commonwealth v. Nichols*, 280 S.W.3d 39, 42 (Ky. 2009). But according to the plain language of RCr 8.09, a defendant who enters a conditional plea of guilty has the right "to review of the adverse determination of **any specified trial or pretrial motion**" [Emphasis added]. The circuit court said that the district court judgment was not final because the district court failed to impose a specific amount of restitution. (TR 57-59, 70-72; App. A1-3, B1-3).

The ruling reserved for appeal in Ms. Dillard's case was an issue involving the jurisdiction of district court. The prosecutor in district court defined the issue, "I believe we are here today to determine if the court has jurisdiction or the authority to order restitution in a 'no insurance' accident case." (AR, 1/7/11, 02:00). The issue reserved for appellate review was a jurisdictional issue that was not dependent upon the court actually imposing an amount of restitution. The district court judge characterized the issue as,

“You want a ruling on whether or not this person, if convicted, could be held accountable for the restitution, correct?” (AR, 1/7/11, 03:30)

When the circuit court dismissed the appeal for lack of jurisdiction, the Commonwealth did not oppose Ms. Dillard’s motion for reconsideration, stating its belief that “this case was properly appealable pursuant to the provisions of RCr 8.09 which permits a defendant to enter a conditional plea of guilty.” (TR 68). While it is true that the parties cannot, by agreement, confer jurisdiction upon a court [*Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005)], in this case, appellate jurisdiction was conferred by operation of KRS 533.020 and RCr 8.09. According to KRS 533.020, the district court judgment that ordered a conditionally discharged sentence was a final judgment.

Furthermore, the very language of RCr 8.09, authorizing a “conditional” plea of guilty, signifies that the plea and the judgment rendered thereon is conditional rather than final, but an appeal may nonetheless be taken. The circuit court relied upon *Tipton v. Commonwealth*, 770 S.W.2d 239 (Ky. App. 1989), for the proposition that interlocutory orders are not reviewable by direct appeal. (TR 58; App. C2). But *Tipton* was based upon the plain language of KRS 22A.020, which allows the Commonwealth to take an interlocutory appeal from circuit court to the Court of Appeals but does not authorize such an appeal from district to circuit court. RCr 8.09 allows a defendant to appeal from the ruling on “any specified pretrial motion.” RCr 8.09 is not limited, like KRS 22A.020, to appeals from circuit court to this Court.

Even if the judgment from which the appeal was taken was interlocutory, the appeal was authorized by RCr 8.09. In both the August 3, 2011, and September 19, 2011, orders declaring that it had no jurisdiction, the circuit court relied upon *Taylor v.*

Commonwealth, 945 S.W.2d 239 (Ky. 1997), and CR 54.01, but the court noted that CR 54.02 allowed interlocutory appeals in some circumstances. (TR 57-59, 70-72; App. B1-3, C1-3). The circuit court completely overlooked that this appeal was taken under the authority of RCr 8.09 and that the issue reserved for appeal was whether the district court had jurisdiction to impose restitution based solely upon Ms. Dillard's violation of KRS 304.39-080(5) and KRS 304.99-060.

In declining to address the merits of the issue preserved for appellate review, the circuit court also relied upon *Brown v. Commonwealth*, 326 S.W.3d 469 (Ky. App. 2010), and *Rollins v. Commonwealth*, 294 S.W.3d 463 (Ky. 2009). (TR 70-72; App. C1-3). But *Brown* was focused upon whether a failure of the court to specify an amount of restitution in a judgment was a "clerical" error that could be corrected at any time or a "judicial" error that could not.

Like *Brown*, *Rollins* was a case in which the court lost jurisdiction to amend a final judgment once ten days had passed after entry of the judgment. *Rollins, supra*, 294 S.W.3d at 467. The *Rollins* Court found that where the trial court had failed to specify the amount of restitution in the judgment, the court could not later correct or amend the judgment to impose an amount of restitution. *Id.* But in so ruling, the Court said, "We note that our result may have been different were we dealing with a case involving probation or an alternative sentence instead of imprisonment, as KRS 533.020 provides that a trial court can modify or enlarge the conditions of probation at any time prior to the expiration of the alternative sentence." *Rollins, supra*, 294 S.W.3d at 466, fn. 5. KRS 533.020 also applies to a conditionally discharged sentence, which is what Ms. Dillard received. The circuit court was mistaken when it declared that it lacked jurisdiction to

hear Ms. Dillard's appeal from her conditional plea of guilty and her conditionally discharged sentence.

In the Court of Appeals, the Commonwealth agreed that the circuit court had jurisdiction to address the merits of the issue reserved for this appeal. (Brief for the Commonwealth, pp. 4-6). The district court entered an order granting Ms. Dillard's "motion to enter a Conditional Plea of Guilty," reserving for appellate review "the Court's ruling regarding the issue of restitution." The standards for appellate review found in *Dickerson v. Commonwealth*, 278 S.W.3d 145, 149 (Ky. 2009), after entry of a conditional plea of guilty were met in Ms. Dillard's case. (Brief for the Commonwealth, pp. 4-5).

For the same reasons that the circuit court was wrong in finding no jurisdiction on appeal, the Court of Appeals was also wrong. Both the circuit court and the Court of Appeals had the ability and obligation to address the restitution issue on its merits. The issue was whether the district court could "order restitution for damages not incurred as a direct result of the specific criminal act(s) of which a defendant has been convicted."² Imposition of a specific dollar amount of money to be paid to the alleged victim of the crime had no bearing on the question of whether the district court had the power to order restitution when the damages incurred by the other motorist were not the direct result of the act constituting the charged criminal offense.

In *Commonwealth v. Morseman*, 379 S.W.3d 144, 152 (Ky. 2012), this Court adopted the law of Maryland as set out by the Court of Appeals of Maryland in *Silver v. Maryland*, 420 Md. 415, 23 A.3d 867, 874 (2011). In *Silver*, the Court of Appeals of

² *Commonwealth v. Morseman*, 379 S.W.3d 144, 147 (Ky. 2012).

Maryland relied, in part, upon an earlier restitution case, *Lee v. State*, 307 Md. 74, 512 A.2d 372 (1986). In *Lee*, the Court had upheld a restitution order that ordered the payment of restitution but did not designate the exact amount to be paid. *See Silver*, 420 Md. 415, 23 A.3d at 875–76 n. 19. In the case before this Court, the decision of the Jefferson District Court to withhold designation of the exact dollar amount of restitution to be paid until after the resolution of the jurisdictional issue reserved for appeal did not deprive the circuit court of the power to address the merits of the reserved issue.

II. The district court erred when it ruled that restitution payments may be imposed upon a person based upon the fact that the person is charged with failure of owner to maintain required insurance under KRS 304.39-080(5) and KRS 304.99-060.

A. The plain language of the statutes provides no authority for courts to impose criminal liability for restitution payments.

This issue was preserved for appellate review by Ms. Dillard’s argument in district court that restitution could be ordered when the charged offense was driving without insurance. On January 5, 2011, the district court judge noted that Ms. Dillard was not charged with having a car wreck, and defense counsel advised the court that the question was whether the legislature intended to tie restitution to the offense of driving without insurance. (AR, 1/5/11, 00). The court then scheduled the matter for a hearing, which was held on January 7, 2011. At that hearing, the prosecutor framed the issue: “I believe we are here today to determine if the court has jurisdiction or the authority to order restitution in a ‘no insurance’ accident case.” (AR, 1/7/11, 02:00). During the hearing, the judge asked, “You want a ruling on whether or not this person, if convicted, could be held accountable for the restitution, correct?” (AR, 1/7/11, 03:30). After more than a half hour of arguments by the parties, the court ruled that it had the jurisdiction to

order restitution upon Ms. Dillard being convicted of driving without insurance. (AR, 1/7/11, 00:30-30:40, 31:00-33:20).

On February 28, 2011, Ms. Dillard entered a conditional plea of guilty, reserving the right to appeal the court's ruling on the issue of restitution. Ms. Dillard was sentenced to 90 days to serve and a \$1000 fine, both conditionally discharged for two years. The court ordered Ms. Dillard to pay restitution to the prosecuting witness, Ms. Halk. The restitution hearing, to determine the specific amount of restitution owed, was stayed, pending appeal.

The issue reserved for appellate review was whether the district court had the jurisdiction and authority to order restitution for damages sustained from a traffic accident when the defendant committed only the crime of failing to maintain insurance. Under Kentucky law, the offense of Failure of Owner to Maintain Required Insurance/Security is a status offense. The Kentucky General Assembly sought to create strict liability for driving without insurance, regardless of the owner's knowledge or intent. Here, although Ms. Dillard believed that she had insurance, she is admittedly guilty of this offense. However, there is no language in Kentucky statutes authorizing a court to impose restitution.

Kentucky Revised Statute (KRS) 304.39-080(5) states in pertinent part:

[E]very owner or operator of a motor vehicle registered in this Commonwealth or operated in this Commonwealth with an owner's permission shall continuously provide . . . , by a contract of insurance or by qualifying as a self-insurer, security for the payment of basic reparation benefits in accordance with this subtitle and security for payment of tort liabilities, arising from maintenance or use of the motor vehicle.

Criminal penalties for violation of this statute are addressed in KRS 186A.040 and KRS 304.99-060. In KRS 186A.040, the Department of Vehicle Registration has authority to

revoke a vehicle owner's registration. Further, KRS 304.99-060 provides for a fine ranging from \$500 to \$1000 and/or 90 days in jail for a first offense. This statute gives the court discretion to conditionally discharge the penalty, which the court exercised in the instant case. There is no language in Subtitle 39 of KRS Chapter 304 or in KRS 186A.040 that provides the court with authority to link the conditionally discharged fine or jail sentence to restitution payments. None of these statutes make any reference to restitution for damages caused in an accident when one or more drivers lack insurance.

Looking outside the statutes that govern insurance, there are two other statutes that address restitution. First, under KRS 431.200, a defendant can be held liable for property that she steals or damages. That statute gives the court authority to order restitution for damages caused by "taking, injuring or destroying property." It provides that, after sentencing, a defendant may agree to the amount of reparation. If the defendant does not consent, then "a jury shall be impaneled to try the facts and ascertain the amount and the value of the property, or assess the damage, as the case may be." This statute is inapplicable to the instant case because it addresses specific criminal acts — theft and destruction of property. There are no allegations that Ms. Dillard stole Ms. Halk's vehicle or intentionally set fire to it in order to destroy it.

Second, KRS Chapter 346 governs Compensation of Crime Victims and establishes the Crime Victims Compensation Board. KRS 346.050 states that a "victim of criminally injurious conduct" can be eligible for compensation. "Criminally injurious conduct" is defined in KRS 346.020 as conduct that "poses a substantial threat of personal physical, psychological injury, or death." However, it specifically excludes the operation of a motor vehicle, with the exceptions of driving under the influence or

intentionally inflicting injury or death. In the instant case, there is no evidence to support a claim that Ms. Dillard was intoxicated or that she intentionally caused this accident. This statute supports a finding that the Kentucky General Assembly did not intend for a defendant, charged with driving without insurance, to be held criminally liable for compensation to persons involved in an auto accident.

B. The court lacked authority to impose restitution as a condition of conditional discharge for this offense.

The district court did not have authority to require restitution for the offense at issue in the present case for several reasons: 1) The damage caused is not “a result of the crime”; 2) A separate negligence finding is required; 3) The other driver is not a “victim of a crime”; and 4) The legislature did not intend the probationary period to be extended. Certain statutes do impose payment of restitution as a condition of pretrial diversion, probation, or a conditionally discharged sentence. See KRS 439.563 (restitution as a condition of parole) and KRS 533.030 (restitution as a condition of probation and conditional discharge). *See also* RCr 8.04(2) (pretrial diversion “may include conditions that could be imposed upon probation”).

In enacting the restitution statutes, the legislature intended for the court to order restitution as a condition of probation or conditional discharge in only one instance - when a victim suffers monetary damage as a result of the crime. KRS 533.030(3) states in pertinent part:

When imposing a sentence of probation or conditional discharge in a case where a victim of a crime has suffered monetary damage *as a result of the crime* due to his property having been converted, stolen, or unlawfully obtained, or its value substantially decreased *as a result of the crime*, or where the victim suffered actual medical expenses, direct out-of-pocket losses, or loss of earning as

a direct result of the crime, or where the victim incurred expenses in relocating for the purpose of the victim's safety or the safety of a member of the victim's household, or if *as a direct result of the crime* the victim incurred medical expenses that were paid by the Cabinet for Health and Family Services, the Crime Victims Compensation Board, or any other governmental entity, the court shall order the defendant to make restitution in addition to any other penalty provided for the commission of the offense.

(Emphasis added). Under KRS 533.030(3), there must be a connection between the crime and the resulting damage, and the damages must be a *direct* result of the crime.

The issue presented in this case was resolved by this Court in *Commonwealth v. Morseman*, 379 S.W.3d 144 (Ky. 2012).³ In *Morseman*, this Court framed the issue:

The issue before this Court is whether a trial court can order restitution for damages not incurred as a direct result of the specific criminal act(s) of which a defendant has been convicted. Specifically, in this case we must determine whether the trial court abused its discretion when, as part of a plea agreement, it ordered Appellee to reimburse Amica for insurance proceeds distributed for property damage, alternative housing, and living expenses, which were damages not incurred as a result of Appellee's fraudulent insurance acts — the only crime for which he pled guilty.

Commonwealth v. Morseman, 379 S.W.3d at 147-148 [footnote omitted]. This Court first found that the damages incurred by a victim that may be the subject of a restitution order must have been inflicted as a direct result of the acts that are elements of the crime of conviction. Having made this finding, the Court then identified one narrow exception:

³ In footnote 1 of its opinion in *Dillard v. Commonwealth*, the Court of Appeals cited *Morseman*, but expressed its belief that the rule announced in *Morseman* did not prevent the imposition of restitution in Ms. Dillard's case. But, in so doing, the Court of Appeals admitted that the driving without insurance statutes [KRS 304.39-110 and KRS 304.99-060] did not contain a causal connection between the criminal offense and the accidental damages for which restitution could be ordered. The Court of Appeals found causation to be a separate issue for the court. *Dillard v. Commonwealth*, No. 2011-CA-001917-DG, p. 6 n. 1.

Finally, in Maryland, the general rule is that “a trial court may not order a criminal defendant to pay restitution to a victim of a crime for which he was not convicted.” *Silver v. Maryland*, 420 Md. 415, 23 A.3d 867, 874 (2011). This rule is subject to one very narrow exception: “a restitution order regarding alleged crimes for which the defendant was not convicted is valid only if the defendant freely and voluntarily agrees to make restitution to victims of the other, alleged crimes as part of a plea agreement.” *Id.* at 875. We agree and adopt this Maryland rule as the law of Kentucky.

Commonwealth v. Morseman, 379 S.W.3d at 152. In its ruling, this Court clearly adopted the view of Maryland and other states that a court may only order restitution where the criminal offense actually caused the damage: “Several of our sister courts have considered this very issue and concluded that plea agreements should be treated as exceptions to restitution statutes that, like KRS 532.350(1)(a), require a causal connection between the criminal act and the ordered restitution.” *Morseman, supra*, at 151.

In most instances, causation is clear, and there is a connection between the crime and the resulting damage. For example, if a defendant steals a vehicle, then the loss of the vehicle is a direct result of the crime of theft, and the court must order the defendant to make restitution. If a defendant stabs a person with a knife, then the victim’s medical bills and lost wages are a direct result of the crime of assault. If a defendant drives while intoxicated, then damage to another person’s vehicle is a result of the crime of driving under the influence. In these examples, the crime itself proves that the defendant acted intentionally or wantonly. The resulting damage flows directly from defendant’s conduct; therefore, the damage is a result of the crime.

By contrast, in the instant offense, causation is absent. The crime here is Ms. Dillard’s failure to maintain insurance. This crime did not cause the damage to Ms.

Halk's vehicle nor the resulting monetary loss. Rather, the damage and loss are a direct result of the collision. Ms. Dillard's failure to have insurance did not cause the accident. Alternatively, if Ms. Dillard had insurance, this would not have prevented the accident.

Even if the legislature amended Subtitle 39 to add a *mens rea* element, or if the court interpreted the statute to require intent or knowledge, this would still not resolve the causation issue. The Commonwealth would have to show that a defendant lacked a valid insurance policy and that she knew it had lapsed or intended it to lapse. Her knowledge and intent would have to be proven beyond a reasonable doubt. Even so, this would not show that the defendant intended the accident to occur or that she caused it. Damages arising from an auto accident still would not be a result of the crime. Further, this would frustrate the legislative intent in Subtitle 39 because it would no longer be a status offense, imposing strict liability.

Second, in the examples above, those crimes do not have a separate, unrelated, negligence finding. With theft, assault, or driving under the influence, the defendant's improper conduct is an element of the crime itself (*mens rea*). A conviction of the crime justifies criminal liability for damages caused by the crime because the damages flow from the defendant's conduct. With respect to those crimes, a court has authority to link the defendant's probation or conditional discharge time to restitution payments.

By contrast, even though a driver lacks insurance, it does not mean that that driver acted negligently in causing the accident. When an accident occurs, the offense requires a negligence finding – that the person was negligent and that the person's negligence caused the accident. Even after a conviction or plea to a failure to maintain insurance offense, there must be a separate finding of negligence in order for a defendant to be

liable for damages. The crime itself does not prove negligence, and therefore does not establish causation, which is a necessary prerequisite to the imposition of restitution. *See Morseman, supra*, at 151.

Third, the offense of Failure of Owner to Maintain Required Insurance is a victimless crime. It is a status offense, and an offense against the Commonwealth. The legislature wants to discourage individuals from driving without insurance. As such, when this occurs, the person is subjected to hefty fines and a jail sentence. When a person drives without insurance and an accident occurs, the other driver is not a victim of the crime.

KRS 533.030 states in pertinent part:

When imposing a sentence of probation or conditional discharge in a case where *a victim of a crime* has suffered monetary damage as a result of the crime . . . the court shall order the defendant to make restitution in addition to any other penalty provided for the commission of the offense.

In this instance, Ms. Halk is not a victim of this offense. Instead, she is the victim of an *accident*. There is no evidence that any of the parties violated a law that caused the accident to occur on February 12, 2010. Any time a person elects to drive a vehicle, they assume the risk of an accident and of potential damage to their vehicle.

Lastly, when a person is convicted of the offense of driving without insurance, the legislature did not intend the probationary period to be extended. When a court orders restitution, the probationary period, diversion period or conditional discharge period extends until restitution is paid in full. KRS 532.033(8) forbids a court from releasing a defendant from probation until restitution has been paid in full. Further, KRS 533.020

provides that the probationary period for a misdemeanor offense is two years or “the time necessary to complete restitution, whichever is longer.”

A defendant who violates Subtitle 39 is subjected to a \$500 to \$1,000 fine and/or up to 90 days in jail. The court has explicit authority to conditionally discharge this sentence. *See* KRS 304.99-060(1)(a) and (b). The legislature intended this to be an incentive for a defendant to maintain insurance for at least the two-year period of the conditional discharge time or to risk paying the fine and serving the sentence. Additionally, the legislature intended the penalties for the second offense to deter motorists from driving uninsured by imposing a fine of \$1,000 to \$2,500 and/or a 180-day sentence. KRS 304.99-060(1)(a).

Imposing an automatic restitution requirement on a person who violates KRS 304.39-080(5) would allow the law to reach too far. Kentucky law penalizes a person who owns a vehicle registered in this state and fails to provide insurance, even if that owner is not the person operating the vehicle. KRS 304.39-080(5). Thus, the owner of a vehicle, who was not even driving the vehicle, can be held criminally liable for thousands of dollars in damages, regardless of the person’s lack of negligence in causing the accident. Not only does this cause a defendant to be guilty of negligence per se, but it clearly violates due process and is outside the legislative intent of the statute.

Therefore, it is improper to interpret KRS 533.030 as authorizing a court to order a defendant to make restitution based simply upon a violation of KRS 304.39-080(5). The damage from an automobile accident is not a result of an owner’s failure to maintain insurance. Also, since it is a strict liability offense, the defendant’s conduct in committing the crime does not support a finding that she negligently caused the damage.

The “victim” in these offenses is the Commonwealth, not the other driver, who is merely a victim of an accident.

C. Criminal courts are not equipped to resolve the civil issues involved in determinations of causation, damages and apportionment, and a restitution hearing is an inappropriate forum to attempt to do so.

If the Kentucky General Assembly intended for a person convicted of Failure of Owner to Maintain Required Insurance to be criminally liable for restitution, it could have written the statutes to reflect this intent. The legislature could easily amend KRS 304.99-060(1)(a) to include reparations as a penalty and to provide for a restitution hearing to determine whether the defendant is liable and the actual amount of damages. The legislature did not add this provision because this would result in an impossible situation, due to four factors: 1) Jurisdiction issues; 2) The standard of proof; 3) Determination of fault; and 4) Determination of value. Further, for the same reasons, a restitution hearing is an inappropriate forum, and a defendant is entitled to have these issues addressed by a jury.

First, Jefferson District Courts have jurisdiction over civil claims involving amounts that are \$4,000 or less. KRS 24A.120. It is not reasonable for the same district courts to have jurisdiction over criminal cases that have potential claims well over \$4,000. Assuming that the civil issues of negligence and the amount of damage could be addressed in a restitution hearing, it is ineffective for circuit courts to have their dockets clogged with traffic offenses. It is just as ineffective for district traffic courts to have their dockets clogged with lengthy restitution hearings, involving these complex civil issues. These issues should be determined by a jury in a civil trial.

Second, which standard of proof should courts apply? Here, there are competing standards – the civil standard associated with recovery of damages caused by negligence, and the criminal standard associated with proving a crime. The criminal penalties set out in KRS 304.99-060 include a sentence of 90 days in jail. A defendant's failure to make timely restitution payments results in a probation revocation. As such, the criminal standard, beyond a reasonable doubt should apply. This would require the Commonwealth to prove beyond a reasonable doubt that the defendant not only lacked insurance, but also caused the accident. Alternatively, a civil standard of preponderance of the evidence could apply to the issue of causation, with a bifurcated trial on each issue.

Third, how is fault to be determined? Regardless of which standard of proof applies, the Commonwealth must prove in a criminal court that the defendant was at fault in the accident. As such, this would unduly burden the Louisville Metro Police Department by requiring officers to thoroughly investigate every automobile accident that occurs. In every accident, the responding police officer would need to interview witnesses, collect evidence, photograph the scene, and collect sufficient evidence to prove that the defendant who lacked insurance was also the cause of the accident.

For example, insurance companies conduct detailed, independent investigations regarding fault. If their insured claims that she is not at fault in the accident, then the insurance company will investigate the accident, interview the drivers and passengers, diagram the scene, and use accident-reconstruction experts to assist them. When they deny payment, the other party will file a civil complaint. The legislature knew that police officers are ill-equipped to perform this type of investigation every time a driver fails to

maintain insurance. As such, the legislature left these civil issues to the proper arena – a civil courtroom.

Further, in a civil trial, fault will be apportioned amongst the parties involved, based on each party's negligence. An insurance company then has the option of pursuing subrogation from other liable parties or their insurers. Here, Ms. Dillard is entitled to have fault apportioned amongst all the drivers. In the instance case, there were four vehicles involved. Officer Rawlings determined that Ms. Dillard was at fault in the accident, but there is little to support this determination, except that Ms. Dillard's vehicle was the first to catch on fire. This, in turn, caused Ms. Halk's vehicle to catch on fire. There is no information regarding what caused the collision in the first place. Ms. Dillard's vehicle was last, following the other three vehicles. It is unknown whether she was also the last one to become involved in the four-car collision.

Ms. Dillard maintains that the first vehicle caused the accident and then fled the scene. It is possible that Ms. Napper (driver of the second vehicle) slammed on her breaks to avoid hitting the unknown driver, which caused Ms. Halk to collide with Ms. Napper. Further, it is a possibility that Ms. Halk was reckless in driving too closely. It is also possible that Ms. Dillard's vehicle had an improper design with the potential to leak fuel, which caused it to catch fire. Ms. Halk can sue Ms. Dillard for damage caused when Ms. Halk's vehicle caught fire; in turn, Ms. Dillard can pursue recovery from the manufacturer of her vehicle. The legislature chose to not include a provision for restitution in Subtitle 39 because of the complexities involving a determination of fault. For these reasons, a restitution hearing is also inappropriate.

Third, how is value to be determined? County attorneys and defense attorneys are not equipped to determine value. Insurance companies do not rely on citations to determine liability; rather, they independently investigate. They send an adjuster to the impoundment lot to examine and photograph the vehicle. They deduct for prior damage and depreciate the vehicle's value based on mileage, age of the tires, and the paint condition, along with other factors. Insurance companies use detailed estimating systems that are designed to calculate when the cost of repair exceeds the cost of replacement.

Not only is a restitution hearing insufficient to address these issues, a defendant's liberty is at risk because his probation is conditioned upon timely restitution payments. As such, due process requires the amount of restitution to be based on a more thorough and detailed determination than the Commonwealth's brief inquiry into the vehicle's listed value in the *Kelley Blue Book*.

For these reasons, it is clear that the legislature made a valid determination to not create criminal liability for restitution arising from an auto accident. The court would be required to set out parameters to resolve the issues arising with jurisdiction and with the appropriate standard of proof, which would violate the separation of powers doctrine. Further, judicial economy demonstrates that the issue of restitution is better suited to the civil arena. The civil components regarding fault and value would unduly clog the docket of district courts, especially in criminal traffic court. These reasons not only reflect the legislature's intent, they also show that a restitution hearing is an inappropriate forum and that a defendant is entitled to have a jury resolve the issues of fault and value.

D. Requiring restitution for this offense creates negligence per se, which violates the right to a jury trial, usurps due process, and is contrary to long standing precedent.

A restitution hearing is an inappropriate forum to address the complex issues involved in an auto accident. Where fault and damages are issues, the defendant has a right to a jury trial. Imposing restitution based upon a violation of KRS 304.39-080(5) creates negligence per se, which clearly violates long-standing precedent from this Court and its predecessor.

The right to a trial by jury is guaranteed under Section 7 of the Kentucky Constitution. With respect to disputes based on negligence, a jury trial is the proper forum. "A civil cause of action for damages sustained 'is the classical textbook paradigm of an action at law wherein "[t]he constitution guarantees a trial by jury in cases of this character.'" *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (1992)." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 908 S.W.2d 104, 109 (Ky. 1995). A civil proceeding has due process procedures in place to protect a defendant's rights. Any proof regarding the defendant's insurance or lack thereof is inadmissible in a civil proceeding. See KRE 411. Further, a guilty plea for the offense of Failure of Owner to Maintain Required Insurance is also likely to be inadmissible. See *Rentschler v. Lewis*, 33 S.W.3d 518 (Ky. 2000). A jury would be required to apportion fault and determine value without the risk of prejudice caused by this information.

In *Rentschler*, at issue was whether the defendant negligently operated his vehicle. *Id.* at 519. On the date of the accident, the defendant believed that he had a valid operator's license, which was later determined to be suspended. This Court stated:

The fact of consequence in this case is whether the manner in which [the defendant] operated his vehicle was a

substantial factor in causing the accident. His status as a licensed or unlicensed driver would not tend to prove or disprove that fact. Therefore, the trial judge correctly concluded that such evidence was irrelevant, thus inadmissible.

Id. See also *Moore v. Hart*, 171 Ky. 725, 188 S.W. 861 (Ky. 1916) (holding that proof that the vehicle is unregistered and the driver is unlicensed is inadmissible unless it has a causal connection to the injury); *Baber v. Merman*, 249 S.W.2d 142 (Ky. 1952) (holding that evidence that the plaintiff lacked a driver's license was irrelevant to whether he was guilty of contributory negligence).

The *Rentschler* Court cited to *Moore*, recognizing that it had previously rejected the argument that an unlicensed driver was a “trespasser upon the highway.” The Court stated that:

Of course it might be argued that but for the violation of law the car would not have been on the road and hence would not have been involved in the accident. But that can hardly be treated as a cause in the legal sense. The accident could just as well have happened had the car been legally registered.

Rentschler v. Lewis, 33 S.W.3d at 519. The Court rejected the argument that a person who drives without a license was “guilty of negligence per se and not entitled to the protections of the law” and stated that the concept is a “cruel and savage doctrine.” *Id.* at 519 (quoting *Moore*, 18 S.W. at 863).

In the instant case, the offense at issue is similar to driving without a license or without vehicle registration. A defendant who must pay restitution because she drives without insurance would be found “guilty of negligence per se and is not entitled to the protections of the law.”

Under Subtitle 39, the penalty for the second and each subsequent offense for failing to maintain insurance includes revocation of the defendant's driver's license. KRS 304.99-060(1)(a)3. Thus, if the defendant is in an auto accident, she will be charged with driving on a suspended license and failure to maintain insurance. Ironically, under *Rentschler*, she cannot be held liable for restitution for driving on a suspended license because this would be negligence per se. This is true even though the license was suspended because of her failure to maintain insurance. Yet, if the Commonwealth is correct, the defendant can be held liable for restitution for driving without insurance. This distinction is irrational and contrary to the Court's holding in *Rentschler*.

This Court reasoned that a rebuttable presumption of negligence is allowed, but only if the facts that create the presumption have "a logical tendency[]" to prove the principal fact." *Rentschler* at 520. The Court also stated: "The mere failure . . . to procure an operator's license prior to the accident had no natural and rational evidentiary relation to-or a logical tendency to prove the principal fact." *Id.* at 520 (quoting *Tipton v. Estill Ice Co.*, 279 Ky. 793, 132 S.W.2d 347 (Ky. 1939)). Similarly, in the instant case, Ms. Dillard's inability to produce a valid insurance policy has no "logical tendency" to prove that she was at fault in the accident and, therefore, liable for damages.

Lastly, the *Rentschler* Court stated: "Where the facts of an accident do not show any causal connection between the violation of a statute and the injury suffered, then such violation is irrelevant and plays no part in the determination of liability." *Rentschler v. Lewis*, 33 S.W.3d at 520. (quoting *Ross v. Jones*, 316 S.W.2d 845, 847 (Ky. 1958)). This clearly supports the arguments above that failure to maintain insurance has no causal

connection to the accident. Any resulting damage is not a result of this crime, and the defendant's lack of insurance is irrelevant.

In its initial order dismissing the appeal, the circuit court said that “‘by way of dicta’ the court will ‘share’ its ‘thoughts’ on the substantive issues the appeal raises.” (TR 58; App. B2). The circuit court then declared that it “agree[d] with the Commonwealth’s position that so long as a subsequent hearing provides the Appellant with the due process hearing required by *Fields v. Commonwealth*, 123 S.W.3d 914 (Ky. App. 2003), and the evidence establishes that the victim in this case suffered property damage as a proximate result of Appellant’s negligent driving, then the victim certainly suffered damage as a result of Appellant’s ‘crime’ – i.e., her failure to maintain liability insurance – within the meaning of KRS 533.030(3), and both this statute and KRS 532.032(3) will require the District Court to order restitution.” (TR 58-59; App. C2-3).

Like the circuit court, despite finding no jurisdiction to address the merits of the restitution issue, the Court of Appeals proceeded to address the merits:

We cannot review this issue on the merits in the absence of a final judgment and order of restitution. However, we can provide some guidance as to what circumstances would allow restitution to be ordered for a violation of KRS 304.99-060.

(App. A4). The Court of Appeals’ guidance included its determination that restitution may be ordered once “liability can be established through a proper restitution hearing.” (App. A6).

But a restitution hearing is effectual at sentencing only when it is clear from the conviction itself that the damage was caused by the defendant and when the amount of restitution can be clearly documented, such as through medical records. A restitution

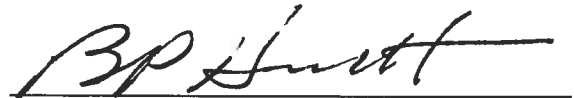
hearing is used to determine the *amount* of the damage, but not the *cause* of the damage. By contrast, with this offense, the cause of the damage is far from clear and cannot be resolved by the mere conviction of failure to maintain insurance. Further, even the amount of damage can be controverted, as discussed above. Discovery and a right to a jury trial are constitutionally mandated when a conviction of an unrelated crime is being used to presume negligence and fault. As such, a restitution hearing is not sufficient in the instant case.

Here, the prosecuting witness, Ms. Halk, can pursue recovery for her damages in a civil proceeding. A jury in a civil court can determine fault and can then apportion damages based on fault. Ms. Halk can then use civil procedures to attempt to collect any amount that is awarded.

Alternatively, if the Court holds that a defendant can be held criminally liable for restitution, stemming from the offense of failure to maintain insurance, then counsel respectfully requests the Court to delineate the standard of proof and jurisdiction, and to provide a mechanism so that a defendant may exercise her right to a jury trial on all the issues.

CONCLUSION

For the foregoing reasons, the movant, Tammy Dillard, respectfully requests that this Court reverse the opinion of the Court of Appeals, the opinion and order of the Jefferson Circuit Court and the judgment of the Jefferson District Court.

A handwritten signature in black ink, appearing to read "BP Hackett", is written over a horizontal line.

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